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No. 88-1342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Illinois Appellate Court properly apply constitutional law? For instance, did it follow the dictates of this Court in applying the "collateral bar" principle? Is its decision consistent with decisions from the Courts of Appeal which have applied the "collateral bar" principle?

2. Did the Illinois Appellate Court apply sound constitutional reasoning? For instance, is the court's application of the "collateral bar" principle in this cause consistent with its prior decision which declared the Illinois public nuisance act unconstitutional?

3. Is the issue presented in this case the same issue this Court sought to review in *United States v. Providence Journal Co.*?

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, entered July 21, 1988, insofar as the petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *People v. Sequoia Books*, 172 Ill.App.3d 627, 522 N.E.2d 50 (1988). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner Sequoia Books seeks review of an order finding it in contempt for violation of a court order. Review involves the inter-relationship between two separate legal actions: one for injunctive relief and the one for contempt.

A) Procedural Background

The Injunction Action

The State initiated the action for injunctive relief, pursuant to the Illinois Public Nuisance Act, alleging that Sequoia Books was using a building in the commission of the offense of obscenity so as to create a public nuisance. An Illinois judge agreed and issued an injunction against Sequoia Books on Janjary 21, 1987. The injunction provided the following:

> 1. That this Court hereby enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns, from maintaining the public nuisance as described in the findings hereinabove and further expressly enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns from exhibiting, selling or offering for sale material in the premises

described above in violation of Chapter 38, § 11-20 Illinois Revised Statutes.

2. That the defendants, Sequoia Books, Inc., Bruce and Cathy Riemenschneider are restrained from maintaining or permitting such nuisance and from using the building described hereinabove for a period of one (1) year hereafter providing that upon the defendants giving Bond to the Clerk of this Court to be approved by this Court in an amount of $5000.00 payable to the State of Illinois and including a condition that no offense specified in § 37-1 of Chapter 38, Illinois Revised Statutes, shall be committed at, in or upon the property described and that the principal obligor and surety assume responsibility for any fine, costs or damages resulting from any such offense hereafter that then and upon the filing of said Bond the defendants may use the building as described.

Sequoia Books filed a notice of appeal. It also posted bond, but the bond was revoked by the court on May 11, 1987, upon a finding that Sequoia Books violated the condition of the bond by selling obscene magazines on the premises on March 4, and 5, 1987.

The Contempt Action

While the appeal in the injunction action was pending, the State of Illinois charged Sequoia Books with contempt of court on the basis that it sold obscene magazines on May 11, 1987 after bond was revoked and the injunction was in full force. The contempt action was the subject of a two day jury trial, June 15-16, 1987. After the State presented evidence that the magazines were obscene, Sequoia Books moved for a directed verdict asserting that the order underlying the alleged contempt was unconstitutional as a prior restraint. This was denied.

Sequoia Books presented no evidence and argued only that the State failed to prove a wilful violation. The jury returned a verdict of guilty of contempt and, on June 16, 1987, the court fined Sequoia Books $10,000 plus costs. Sequoia Books filed a notice of appeal.

The Injunction Appeal

Six months later, January, 1988, the Illinois Appellate Court issued its opinion in the injunction appeal. In *People v. Sequoia Books, Inc.*, 165 Ill.App.3d 143, 518 N.E.2d 775 (2nd Dist. 1988), it declared that the obscenity provisions of the Illinois Public Nuisance Act were unconstitutional as a prior restraint.

The Contempt Appeal

Six months after that, July, 1988, the Illinois Appellate Court issued its opinion in this case, affirming the conviction for contempt. Sequoia Books sought further review of the contempt conviction, but this was denied by the Illinois Supreme Court on December 8, 1988. This petition for writ of certiorari followed.

Since then, the Illinois Supreme Court has now affirmed the Appellate Court's decision in the injunction action on March 22, 1989, in *People v. Sequoia Books, Inc.*, No. 66503. It held that the Illinois obscenity provisions of the public nuisance act unconstitutional as a prior restraint.

B) Illinois Appellate Court Reasoning

In the contempt action, the Appellate Court applied the "collateral bar" rule of *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1964). The *Walker* rule is that, generally, a contempt finding must

stand even when it is based on an unconstitutional order of injunction. But *Walker* provides two exceptions when a contemnor may challenge the legality of the underlying order: where 1) the court lacked jurisdiction to enter the order or 2) the order is "transparently invalid."

The Appellate Court held that neither exception applied in this contempt action. The Appellate Court had, in the past, applied the exception for transparently invalid orders where the order had imposed a prior restraint. *See Cooper v. Rockford Newspaper, Inc.*, 50 Ill.App.3d 250, 365 N.E. 2d 746 (1977) (order invalid as enjoining free speech); *see also Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986) (order transparently invalid because it enjoined free speech).

But the order in this case did not enjoin free speech. The injunction order consisted of two separate paragraphs. Paragraph one enjoined Sequoia Books from distributing obscenity. This did not create an impermissible prior restraint because obscenity is not within the area of constitutionally protected speech. Prior restraints against obscene publications are constitutionally valid. Sequoia Books could not be subject to contempt for the sale of nonobscene material. After all, the contempt finding in this cause issued only because the jury found that the magazines sold by Sequoia Books were obscene. Therefore, paragraph one was not a transparently invalid order.

The Appellate Court explained that this decision did not conflict with its earlier decision in the injunction action. The earlier decision declaring the public nuisance act unconstitutional was based on paragraph two of the injunction. Only paragraph two was concerned with enjoining use of the building. This paragraph created a prior restraint on free speech since it prevented use of the building for one year even for the future sale of nonobscene materials.

However, paragraph one did not enjoin use of the building nor the dissemination of free speech. It was a constitutionally valid order and Sequoia Books was collaterally barred from challenging it by way of a contempt citation.

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT PROPERLY FOLLOWED CONSTITUTIONAL PRINCIPLES IN APPLYING THE "COLLATERAL BAR" PRINCIPLE; IT DID NOT CREATE A CONFLICT WITH ONE OF ITS OWN PRIOR DECISIONS; THE ISSUE PRESENTED IN THIS CASE IS NOT THE SAME ISSUE THAT WAS PRESENTED IN THE *PROVIDENCE JOURNAL* CASE.

Petitioner Sequoia Books suggests several reasons why this Court must accept review. First, petitioner claims that the Illinois Appellate Court did not properly apply constitutional law. Second, petitioner claims that the Illinois Appellate Court's reasoning is not sound because application of the "collateral bar" principle in this cause is not consistent with the Illinois Appellate Court's prior decision which declared the Illinois public nuisance act unconstitutional. Third, petitioner claims that the issue presented in this case is the same issue this Court sought to review recently in *United States v. Providence Journal Co.*

However, in this cause, the Illinois Appellate Court clearly followed the dictates of this Court in applying the "collateral bar" principle. Furthermore, the Illinois Appellate Court's decision is consistent with decisions from the Courts of Appeal which have also applied the "collateral

bar" principle. The decision does not conflict with the Illinois Appellate Court's prior decision which declared the public nuisance act unconstitutional. Finally, the issue in this case is not the same issue that was presented in the *Providence Journal* case.

The Illinois Appellate Court correctly applied the "collateral bar" rule that this Court defined in *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824 (1964). The *Walker* rule is that, when a party believes an injunction creates an unconstitutional prior restraint, he must still abide the injunction. *Walker*, 388 U.S. at 313-314, 87 S.Ct. at 1828; *Maness v. Meyers*, 419 U.S. 449, 458, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975). Any attempt to challenge the constitutionality of the injunction by way of a collateral action such as contempt is barred because the proper route for review is a direct appeal of the order of injunction. *Walker*, 388 U.S. at 314, 87 S.Ct. at 1828.

However, there are two exceptions when a party need not abide an injunction: 1) when the court lacked jurisdiction to enter the injunction or 2) when the injunction is "transparently invalid". *Walker*, 388 U.S. at 315, 87 S.Ct. at 1829; *see Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). In these instances, the injunction is not protected by the collateral bar rule. The exceptions balance the need for respect for court orders with the right of the citizen to be free of a clearly improper exercise of judicial authority. *See Matter of Providence Journal Co.*, 820 F.2d at 1347.

The Appellate Court also correctly analyzed the decision by the First Circuit in *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). There, a temporary injunction barred a party from establishing certain logs and memoranda. The party published them anyway and

thereby challenged the validity of the order by way of a collateral action for contempt, alleging that the order created an unconstitutional prior restraint on pure speech.

The First Circuit found that review was not collaterally barred under the *Walker* test because the order was transparently invalid. Several factors made the invalidity of the injunction manifestly transparent: 1) the order constituted a prior restraint suppressing free speech which created a virtually insurmountable presumption of unconstitutionality; 2) the trial court had, before issuing the order, failed to make findings necessary to support a prior restraint, namely that publication would result in damage to a near sacred right, that the prior restraint would be effective, and that less extreme measures were not available and 3) the prior restraint issued in the absence of a full and fair hearing with all the attendant procedural protections. *Providence Journal*, 820 F.2d at 1350-1351. Therefore, the collateral bar rule did not prevent review.

The Illinois Appellate Court carefully considered *Walker* and *Providence Journal* and correctly determined that, in this case, review of the validity of the injunction was barred. Here, there was simply no prior restraint that was the cause for concern in *Providence Journal*. Paragraph one of the injunction enjoined the sale of obscene material. It did not suppress the right of Sequoia Books to sell nonobscene material. This provision of the injunction was not transparently invalid.

This Court must agree that, since paragraph one did not amount to a prior restraint, the provision is consistent with all relevant constitutional authority. There is no merit to the claim that the decision conflicts with *Walker* and *Providence Journal*. Sequoia Books is collaterally barred from challenging the validity of that provision by way of a contempt citation.

Nor is there any merit to the claim that the Appellate Court's decision conflicts with its own prior opinion, which arose on the same injunction, declaring the public nuisance act unconstitutional. In that previous opinion, the court made clear that only paragraph two of the injunction was based on the public nuisance act provision which permitted the closing of a building. This act impermissibly allowed the court to enjoin use of the building for one year. Such an order was necessarily invalid as a prior restraint on free speech because it prevented the future selling of even non-obscene material. This paragraph required the striking of the public nuisance act. Paragraph one, which did not authorize shutting down the building, had nothing to do with the decision in that previous cause.

The difference between paragraphs one and two also negates petitioner's suggestion that, because the public nuisance act was unconstitutional, the court lacked jurisdiction to enter the injunction. The trial court certainly had jurisdiction to enjoin petitioner, as it did in paragraph one, from disseminating obscene materials since, in Illinois, obscenity is a criminal offense. This proscription did not arise out of the public nuisance act; hence, the unconstitutionality of the act had no affect on the court's jurisdiction to enter that order.

Finally, the issue in this case is not the same issue this Court sought to review in the *Providence Journal* case. This Court granted certiorari review in the *Providence Journal* case, only to dismiss the writ of certiorari as improvidently granted on a finding of lack of jurisdiction to hear that cause. *United States v. Providence Journal Co.*, 108 S. Ct. 1502 (1988).

But that cause presented an issue different from this one. In *Providence Journal*, the record supported the conclusion that the contemnor violated an order that was in-

valid as a prior restraint. Thus, it was necessary to compare and weigh two very important and competing principles that arose in that cause—the need for respect of court orders against the right to free speech.

But here, by contrast, the record supports the Appellate Court's conclusion that contemnor violated an order that did not constitute a prior restraint. Thus, only one constitutional issue is involved, namely, the need for respect of court orders. There is no basis on which to weigh this principle against the right to free speech. Sequoia Books simply cannot show that paragraph one impinged any freedom of speech.

Here the Illinois Appellate Court properly vindicated the principle that all orders of courts must be complied with promptly. There is no reason for this Court to intervene.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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